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No. 90-1952

In the
Supreme Court of the United States

OCTOBER TERM, 1991

ALAN W. FINI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner's Reply to Respondent's Brief in Opposition

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September 25, 1991

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Statement.

At trial the central evidence against Alan Fini consisted of tape recordings of conversations between Mr. Fini and a state government informant, Gary Forish. The conversations were seized by a warrantless wiretap investigation initiated, planned, conducted and administered exclusively by the state police. State police Corporal Thomas Guilmet directed the investigation.

The state police procedure for taping the conversations was as follows:

Guilmet and other state troopers first would brief Forish before he went to meet with Fini. The state police then would search him, his vehicle, and his person. Guilmet next would wire Forish with the transmitter, tape it to his body, test the equipment, and then send him on his way. The state police would listen and record the conversations, being on one end of the voice-activated tape recorder. Forish would meet with Fini and then return to the state police's pre-arranged location. Guilmet later would listen to the tapes and review the transcripts, which his office prepared.

There was no federal involvement whatsoever in the planning or execution of the warrantless seizure of Mr. Fini's conversations, and no federal drug enforcement officer testified at Mr. Fini's trial. All the law enforcement evidence connecting Alan Fini to drugs and drug sales came from state law enforcement officers.[1] At trial Guilmet authenticated the tapes.

Argument.

In *United States* v. *DiRe*, 332 U.S. 581, 589 (1948), the court held that, in the absence of an applicable federal statute, the validity of a warrantless arrest is determined by the law of the state where the arrest takes place. The Supreme Court consistently has affirmed the vitality of *DiRe*. *United States* v. *Watson*, 423 U.S. 411, 428 n.8 (1976); *Ker* v. *California*, 374 U.S. 23, 37-41 (1963); *Miller* v. *United States*, 357 U.S. 301, 305-306 (1958); *Johnson* v. *United States*, 333 U.S. 10, 15 n.5 (1948).

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[1] The only federal law enforcement officers to testify at the trial were from the Internal Revenue Service. They testified about the tax evasion counts brought against Mr. Fini.

An arrest is a type of Fourth Amendment seizure. *Davis* v. *Mississippi*, 394 U.S. 721, 726-727 (1969) ("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigat[ions]'.") There is no analytical distinction between a seizure in the form of an arrest and a seizure in the form of electronic surveillance.

DiRe applies here. No federal statute governs the admissibility in a federal trial of evidence obtained from a state-conducted warrantless wiretap investigation.

The tension that exists between *United States* v. *DiRe* (state law governs legality of an arrest) and *Elkins* v. *United States*, 364 U.S. 206 (1960) (federal law governs legality of a search to the extent that state officials cannot hand over to federal authorities on a silver platter evidence seized in violation of federal law), is put into sharp relief by this case. The rationale of *DiRe* applies to this case — a warrantless electronic seizure, conducted by state law enforcement officials, which is unlawful under both constitutional provisions and state statutory law.

In addition to the Fourth Amendment, principles of comity and federalism are frustrated when, as here, federal courts hold state officers blameless after state courts have condemned that precise conduct. Likewise damaged is the state's interest in insuring fundamental rights guaranteed by the state's constitution. When state law can be rendered nugatory at whim by federal officials, the federal government is no longer one of limited, designated powers. If the government's position prevails here, it means, as a practical matter, that all police powers are ultimately reserved not to the states, but to the federal government.

Conclusion.

For all the foregoing reasons and those stated in our principal petition, this Honorable Court should grant Alan W. Fini's petition for certiorari and order full briefing and argument.

Respectfully submitted,

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